(5)

No. 96-8732

In The

Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH, HORACE JOINER & JOSEPH TIDWELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Under 21 U.S.C. §§ 841(b) and 846, conspiracy to distribute "cocaine base" is punished more harshly than conspiracy to distribute "cocaine." When a defendant has been convicted of a single conspiracy to distribute the two substances based on a general jury verdict which does not disclose the object of the conspiracy of which the jury found the defendant guilty, must he be sentenced on the basis of the criminal object carrying the lesser penalty or be provided a new trial?

PARTIES TO THE PROCEEDING

Petitioners, Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell, were the appellants below. Respondent, the United States of America, was the appellee below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled *United States v. Edwards*, is reported at 105 F.3d 1179 (7th Cir. 1997), and is included in the Joint Appendix at section A-5. (J.A. 179-86).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On January 30, 1997, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of the District Court in the case of *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997). A Petition for Certiorari on behalf of all Petitioners was filed on April 21, 1997. This Court granted certiorari on October 20, 1997. (J.A. 187).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are set forth in full in Appendix A to this brief: the Fifth and Sixth Amendments of the Constitution of the United States; 21 U.S.C. § 846; and 21 U.S.C. § 841.

STATEMENT OF THE CASE

A. The Indictment

The indictment in this case (No. 93 CR 20024) was returned by the Grand Jury sitting in the United States District Court for the Northern District of Illinois, Western Division, on July 27, 1993. (R. at 1).[1] A superseding indictment was filed on November 23, 1993, extending the time period referred to in Count One by one day and adding 11 additional counts. (R. at 357). The superseding

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[1] Citation to the record below is noted by the abbreviation "(R. at ___)" followed by the docket entry of the item referenced.

indictment named 20 defendants in 26 counts charging these individuals with various narcotics and firearms offenses in violation of 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. §§ 924(c) and 922(g). (R. at 357; J.A. 4-12).

Count One of the superseding indictment charged all five Petitioners, as well as 15 others, with conspiracy to possess with intent to distribute, and conspiracy to distribute, cocaine and cocaine base from a period beginning in 1989 and continuing until July 28, 1993. (J.A. 4-10). The indictment alleged that the Petitioners had agreed with the other named defendants and others unknown, to participate in the street sale of quantities of cocaine and cocaine base in the Rockford, Illinois area through the operation of several drug houses.[2]

Count Four alleged that on or about April 22, 1993, Petitioners Vincent Edwards and Reynolds Wintersmith possessed with the intent to distribute approximately 5.32 grams of mixtures containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (J.A. 11). Count Five alleged that on or about April 30, 1993, Petitioner Joseph Tidwell possessed with the intent to distribute approximately 0.7 grams of a mixture containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (J.A. 12). Finally, Count Six alleged that on or about April 30, 1993, Petitioner Joseph Tidwell used and carried a firearm during and in relation to a drug trafficking crime, namely, the offenses described in Counts One and Five of the indictment, in violation of 18 U.S.C. § 924(c).[3] (J.A. 12).

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[2] Count Two alleged that on or about January 15, 1993, Petitioner Karl Vincent Fort knowingly and intentionally distributed approximately 0.30 grams of a mixture containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (J.A. 11). On June 27, 1994, the Court dismissed this count with prejudice. (R. at 956, 958).

[3] The remaining counts of the superseding indictment (Counts 3 and 7-26) charged offenses only against parties who are not involved in this appeal.

B. The Trial and Verdict

Several defendants charged in the indictment entered guilty pleas prior to trial. (R. at 436, 449, 495, 654). After initially denying various severance motions, the court granted the defendants' motion for severance and divided them into three groups for trial. (R. at 711, 712). The five Petitioners were tried together in the second of the three trials. The trial in this matter commenced on June 27, 1994, in the U.S. District Court for the Northern District of Illinois, Western Division, before the Honorable Philip G. Reinhard. (R. at 958).

Various government witnesses testified at trial that Petitioners played differing roles in a *retail* drug operation in Rockford, Illinois. (*See, e.g.*, Tr. at 912-13, 982-87).[4] Government witnesses testified that the retail operation consisted of a number of drug houses at which individual dosages of powder cocaine were sold to customers who came to the houses. (Tr. at 838). These drugs were packaged at the houses and sold in small "dime bags," or $10 bags. (Tr. at 839-40). Some cooperating witnesses testified that the drug houses later also began to sell cocaine base, or "crack," which certain members of the conspiracy manufactured. Apart from the testimony of these witnesses, the government introduced evidence obtained during searches conducted in July 1993, toward the end of the alleged conspiracy. (*See, e.g.*, Tr. at 1646-67, 2089-2159, 2179-2231, 2302-25). Law enforcement officers also seized small quantities of drugs. (*See, e.g.*, Tr. at 484-546, 616-43, 698-717, 2020-32). In addition, an undercover purchase of powder cocaine from one of the drug houses occurred. (Tr. at 742, 1698-1718).

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[4] The transcript of the trial proceedings is numbered sequentially from jury selection to the return of the verdict. It is cited throughout this brief as "(Tr. at ___)" followed by the page number of the transcript at which the cited assertion appears.

No special verdicts with respect to the different objects of the conspiracy were requested. On July 18, 1994, the jury found all Petitioners guilty of Count One of the indictment, Petitioners Edwards and Wintersmith guilty of Count Four of the indictment, and Petitioner Joseph Tidwell guilty of Counts Five and Six of the indictment. (J.A. 18-23).

C. The Sentencing

On November 21, 1994, Judge Reinhard held a sentencing hearing for Petitioner Karl Vincent Fort. The court held Fort liable for 24 kilograms of cocaine and held that half of that amount was powder cocaine, half was cocaine base. (J.A. 64-86). That quantity of drugs resulted in a base offense level of 38. *See* U.S. Sentencing Guidelines Manual § 2D1.1(c). With the two-level and four-level enhancements for use of weapon and his role in the offense respectively, *id.* § 2D1.1(b)(1) and § 3B1.2, the court set Fort's offense level at 44, resulting in a mandatory life sentence under the Sentencing Guidelines.

On November 23, 1994, Judge Reinhard held a sentencing hearing for Petitioner Reynolds Wintersmith. On Count One, the court held that the core group of which Wintersmith was a member was liable for 8 kilograms of cocaine. The court allocated 50 percent of this amount to powder, the remainder to cocaine base. With regard to Count Four, the court found that Wintersmith possessed 5.32 grams of cocaine base. The court thus set the base offense level at 38. (J.A. 97-113). Including leadership and gun possession enhancements, the court set Wintersmith's total offense level at 44. The court imposed a mandatory life sentence on Count One, along with a concurrent sentence of 40 years of incarceration on Count Four. (J.A. 96).

On November 22, 1994, Judge Reinhard held a sentencing hearing for Petitioner Horace Joiner. On Count One, the court found Joiner liable for 14 grams of cocaine base and 7 grams of powder cocaine, resulting in a base

offense level of 26. With a two-point enhancement for firearm possession, the court placed Joiner's offense level at 28; considering Joiner's criminal history, this resulted in a guideline range of 110-137 months of incarceration. The court imposed a sentence of 126 months. (J.A. 114-42).

On November 22, 1994, Judge Reinhard held a sentencing hearing for Petitioner Vincent Edwards. The court found Edwards liable for 201 grams of powder cocaine and 5.32 grams of cocaine base with respect to Count One and 5.32 grams of cocaine base with respect to Count Four, resulting in a base offense level according to the Sentencing Guidelines of 26. With a two-level enhancement for firearm possession, the court assigned to Edwards a total offense level of 29. In light of his criminal history, this offense level placed Edwards in the Guidelines range of 97 to 121 months. (J.A. 26-36). The court imposed a sentence of 120 months of incarceration.

On January 18, 1995, Judge Reinhard held a sentencing hearing for Petitioner Joseph Tidwell. On Count One, the court found Tidwell liable for 448 grams of cocaine base and 971.6 grams of cocaine powder. On Count Five, the court found that Tidwell distributed 0.7 grams of cocaine base. The court thus found a base offense level of 34. With a two-point enhancement for obstruction of justice, the court placed Tidwell's offense level at 36. In light of Tidwell's criminal history, a guideline range of 210-262 months resulted. The court imposed a sentence of 252 months, plus a five-year consecutive sentence on Count Six. (J.A. 143-52). For all Petitioners, the attribution of cocaine base as the drug agreed to be distributed in Count One was determinative in substantially raising the offense level, and thus greatly increasing the length of the sentence.

D. Appeal to the United States Court of Appeals for the Seventh Circuit

The Petitioners appealed their convictions and sentences to the United States Court of Appeals for the Seventh Circuit. The Petitioners argued that their sentences were improperly imposed because the indictment presented a multi-object conspiracy and the general verdict of guilty did not disclose the object that the jury found each of the Petitioners to have agreed to commit. Relying on the rule developed in eight different courts of appeals confronted with similarly ambiguous verdicts, *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), *appeal after remand*, 70 F.3d 679 (1995), *cert. denied sub nom. Joyce v. United States*, ___ U.S. ___, 116 S. Ct. 1556 (1996); *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 342 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Bounds*, 985 F.2d 188, 193 (5th Cir.), *rehearing denied*, 990 F.2d 628, *cert. denied*, 510 U.S. 845 (1993); *United States v. Owens*, 904 F.2d 411, 414 (8th Cir. 1990); *United States v. Garcia*, 37 F.3d 1359, 1369-70 (9th Cir. 1994), *cert. denied*, 514 U.S. 1067 (1995); *Brown v. United States*, 299 F.2d 438, 440 (D.C. Cir.), *cert. denied sub nom. Thornton v. United States*, 370 U.S. 946 (1962), the Petitioners asked that their convictions be set aside and that they be granted a new trial or that their sentences be based on the object carrying the lesser punishment.

The Seventh Circuit rejected Petitioners' argument. *Edwards*, 105 F.3d at 1180-81. The Seventh Circuit held that under the Sentencing Guidelines, the judge determines the type and quantity of controlled substances involved in an offense and may consider relevant conduct to include drugs not charged or considered by the jury and that the jury's findings "about which drug the conspirators distributed therefore is not conclusive." *Id.* at 1181. The Seventh Circuit also held that the indictment presented to the jury charged the Petitioners with committing a single crime in two ways and "as long as the

jury finds that the defendants conspired to distribute *any* drug proscribed by § 841(a)(1), the judge possesses the power to determine which drug, and how much." *Id.* at 1182 (emphasis in original). Thus, the Seventh Circuit disagreed with the majority of courts of appeals, and affirmed the Petitioners' convictions and sentences.

SUMMARY OF ARGUMENT

The general verdicts in this multi-object conspiracy case are fundamentally ambiguous because they fail to specify the statutory object of the conspiracy under 21 U.S.C. § 846 ("Section 846"). It is impossible to tell, therefore, whether the jury found the Petitioners each guilty of conspiracy to distribute powder cocaine only, cocaine base only, or both powder cocaine and cocaine base – or whether the jury simply never addressed the question of which object each juror found each Petitioner to have conspired to achieve. Even though the jury verdict did not establish that Petitioners were found guilty of conspiring to distribute cocaine base, the District Court sentenced Petitioners on the assumption that the offense of conviction on Count One was conspiracy to distribute both cocaine powder and cocaine base. The Seventh Circuit held that this sentencing procedure is permissible because it found that a Section 846 conspiracy to distribute drugs constitutes a single conspiracy to violate a *single object offense* – namely, 21 U.S.C. § 841(a) ("Section 841(a)") – regardless of the number and variety of drugs involved or the vastly different statutory maximum penalties for each. That decision is in error.

The correct construction of Section 846 demonstrates that, in the case of a conspiracy to violate Section 841(a), the offense of conviction must be defined to include the identity of the drug involved. The sentencing court, therefore, may not assume the offense of conviction is conspiracy to distribute cocaine base unless the jury's verdict specifies the offense of conviction specifically to include cocaine base. Where, as in this case, the verdict

does not specify the drug, the District Court may not base sentencing on the most severe interpretation of the verdict, carrying the highest range of statutory penalties, but must either assume the penalty carrying the lowest statutory sentencing range applies or grant a new trial with a special verdict that will identify the drug or drugs which the jury finds were the object of the conspiracy.

This result is compelled by the express language, statutory structure, and history of Section 846, which demonstrate that Congress intended a jury verdict to specify the object of a Section 846 conspiracy, including the identity of the drug or drugs which was the object of the conspiracy. Recent statutory amendments to Section 846 confirm the conclusion that the type of controlled substance is encompassed in the object of a Section 846 conspiracy.

In addition, this Court's cases discussing the meaning and requirements of conspiratorial agreements, Double Jeopardy principles in narcotics cases, and the Sixth Amendment and Due Process violations which the government's construction would entail, all compel the conclusion that Congress intended the jury to determine the object of the Section 846 offense, including the type of narcotics which were the subject of the alleged agreement. Not only is the government's and Seventh Circuit's construction of Section 846 contrary to the statute's plain meaning, but it would lead to bizarre and unfair results, to unavoidable conflicts with precedents of this Court and the lower courts in related contexts, and to constitutional infirmities. In contrast, Petitioners' construction provides a coherent, consistent and just interpretation of the language and Congressional purpose of Section 846.

ARGUMENT

A. The Jury's Verdicts Failed to Specify the Object of the Section 846 Conspiracy

The verdicts in this case are fundamentally ambiguous because they fail to specify the statutory object of the conspiracy under Section 846. It is impossible to tell, therefore, whether the jury found the Petitioners each guilty of conspiracy to distribute powder cocaine only, cocaine base only, or both powder cocaine and cocaine base – or whether the jury ever addressed the question of which object each juror found each Petitioner to have conspired to achieve.

The indictment charged the Petitioners with conspiring "knowingly and intentionally to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code Section 841(a)(1)." (J.A. 6-7). The conspiracy count did not specify any quantity or range of quantities of cocaine or cocaine base as the sole object of the conspiracy. (J.A. 6-7). The jury was instructed that the indictment charged the Petitioners with "conspiring to possess with intent to distribute and to distribute cocaine and cocaine base," (J.A. 13), and the conspiracy count was so characterized throughout the instructions to the jury. (J.A. 15, 16). However, the jury was further instructed that the Petitioners could be found guilty of Count One if the government proved the conspiracy "involved measurable amounts of cocaine *or* cocaine base." (J.A. 16) (emphasis added).[5]

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[5] The government conceded before the Seventh Circuit that the charge to the jury presented it with a disjunctive choice of finding measurable quantities of cocaine or cocaine base and thus, the jury verdict could rest on either basis to the exclusion of the other. Government's Court of Appeals Brief at 31. The

The indictment as presented to the jury during its deliberations thus presented in a single count of the indictment a conspiracy with multiple possible objects: an agreement to distribute cocaine, an agreement to distribute cocaine base, or an agreement to do both. A conspiracy which has multiple separate objects, even if the two objects violate the same statute in the same general way, is a multiple object conspiracy. *See Griffin v. United States*, 502 U.S. 46, 57 (1991) (conspiracy to impair and impede two separate law enforcement agencies under single general conspiracy statute, 18 U.S.C. § 371, is an example of a "multiple object" conspiracy); *see also United States v. Bush*, 70 F.3d 557, 562 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 795 (1996); *United States v. Pace*, 981 F.2d 1123, 1128-30 (10th Cir. 1992) (conspiracy to distribute amphetamines and methamphetamines was a multiple object conspiracy), *cert. denied sub nom. Leonard v. United States*, 507 U.S. 966 (1993). The government could have sought in this case, and the grand jury could have returned, an indictment charging the conspiracy to distribute cocaine and the conspiracy to distribute cocaine base in separate counts charging separate offenses. *Cf. Albernaz v. United States*, 450 U.S. 333 (1981) (conspiracy to import marijuana and conspiracy to distribute same marijuana are separate offenses); *see also United States v. Richardson*, 86 F.3d 1537, 1551 (10th Cir.) ("simultaneous possession of different controlled substances may qualify as separate offenses") (citing decisions in five circuit

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Seventh Circuit's ruling acknowledged the government's concession and encompassed within its holding the disjunctive nature of the conspiracy charge. *United States v. Edwards*, 105 F.3d 1179, 1182 (7th Cir. 1997) ("In [a previous decision], we held [ ] that there is no problem when the instructions are phrased in the conjunctive, for then the jury necessarily finds that the defendants distributed all of the drugs identified in the indictment. Now we add that there is no problem when the instructions are phrased in the disjunctive . . . ").

courts of appeals), *cert. denied*, ___ U.S. ___, 117 S. Ct. 588 (1996). Instead, the prosecutor presented to the grand jury, and the grand jury voted probable cause on, an indictment setting forth both alleged objects in a single count.

The verdict forms presented to the jury requested general verdicts and simply asked whether the jury found each of the defendants "guilty of the drug conspiracy charge contained in Count One of the indictment." (J.A. 18-23). No special interrogatory or special verdict form was provided to the jury during deliberations seeking this information. Thus, based on the general verdict of guilty to the charge in Count One, no basis exists for determining precisely what the offense of conviction was: a conspiracy to distribute cocaine, a conspiracy to distribute cocaine base, or both.

B. Congress Intended that the Jury Determine the Object of a Section 846 Conspiracy

1. The Plain Language and Structure of the Statute

The plain language and structure of Section 846 indicate that Congress intended and assumed the jury would determine the type of narcotics in a Section 846 conspiracy. Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

This language provides that the definition of the Section 846 conspiracy in each case is tied to potential penalties for the substantive offense, the commission of which was the object of the conspiracy. The term "offense" is used to identify a particular offense for which specific penalties are "prescribed" by statute. Thus, Section 846 expressly identifies "the *object*" of the attempt or conspiracy

charged as the underlying "offense."[6] In the case of conspiracies to distribute drugs, for example, Section 841 sets out different penalties for the different possible *objects* of such a conspiracy, and these different objects depend on the identity of the narcotics in question. A Section 846 conspiracy, therefore, is in each case defined by "the offense" (a) for which penalties are "prescribed" by statute and (b) "the commission of which was the object of the attempt or conspiracy." The "object of the attempt or conspiracy" refers to and expressly incorporates the entirety of any provision setting forth an "offense defined in this subchapter," including its description, its penalty, and its special enhancements.

Thus, for example, a conspiracy to use the telephone to distribute narcotics, 21 U.S.C. § 843(b) ("Section 843(b)"), subjects a defendant to a maximum penalty of four years imprisonment, because Section 843(b) sets forth, in a single paragraph, a description of an offense and only a single maximum penalty of four years. 21 U.S.C. § 843(b). In contrast to Section 843(b), distribution of narcotics under 21 U.S.C. § 841(a) ("Section 841(a)") does *not* define a single range or maximum penalty, as the penalties vary widely depending on, among other things, the identity of the narcotics involved. Congress provided no penalty provision for a generic violation of Section 841(a), but only for specific kinds of violations of Section 841(a). Under Section 841(a), only violations involving specified narcotics prescribe penalties. For this reason, a

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[6] Grammatically speaking, the clause "the commission of which was the object of the conspiracy" modifies the term "offense" that immediately precedes it in the statute. The term "offense" is used twice in the single sentence of Section 846, and "offense" must have the same meaning in both instances. In Section 846, therefore, the term "offense" must refer to the specific "object" for which the specific "penalties" are "prescribed" in the statute the defendant has conspired to violate.

Section 846 conspiracy premised on a Section 841(a) distribution must incorporate the particular subdivision of Section 841(b) setting forth the penalty and any of its statutory maximum enhancements. Only in that way can Congress' explicit directive that the penalty of a conspiracy or attempt "to commit any *offense*" be subject to "the same penalties as those prescribed *for the offense*" be carried out. Section 846's use of the term "offense" must include the identification of the controlled substance in question because Section 846 uses the term "offense" to identify an act for which specific penalties are prescribed, either in Section 841(a) or in another section of the Control and Enforcement subchapter, or in a specific subsection of such other section of the subchapter.

The structure of other provisions of Title 21 confirm that a Section 846 conspiracy to distribute must be read to include identification of the narcotics involved. The potential offenses for Section 846 include, for example, the crimes defined in Section 843. As with Section 841(a), Section 843(a) is labelled "Unlawful Acts" but, despite its misleading title, sets forth only one of several distinct crimes encompassed by Section 843. Section 843(a) governs only a person "who is a registrant to distribute controlled substances," while 843(b) defines a separate offense prohibiting all persons from using a communications facility to commit any crime within Title 21. Like Section 841, many other provisions within the reach of Section 846 set forth the definitions and requirements for distinct criminal offenses with different maximum penalties in different *sub*sections. *E.g.*, 21 U.S.C. § 843(b); 21 U.S.C. § 841(b)(1), (2) & (3); 21 U.S.C. § 841(b)(7)(A). Several of these subsections carry mandatory minimum sentences as well. *E.g.*, 21 U.S.C. § 841(b)(1)(A) & (B). Moreover, all of these offenses require a reference to Section 812, which sets forth the criteria and identification of the five schedules of controlled substances which

are regulated under the Drug Abuse Prevention and Control Act. 21 U.S.C. § 812(a). The Seventh Circuit erroneously assumes that Section 846 conspiracies to distribute narcotics are fully defined by Section 841(a) and require no reference to the particular drugs involved. To commit a Section 846 offense, two or more individuals must agree to commit some offense in the subchapter which has a prescribed penalty.[7]

The plain meaning of Section 846 is confirmed by examining the language of the general conspiracy statute, because the general conspiracy statute also uses the term "the offense, the commission of which is the object of the conspiracy" to include a sufficient definition of the offense sufficient to determine which of the two statutory maximums apply. 18 U.S.C. § 371. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, ___, 114 S. Ct. 655, 660 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). In Section 371, Congress distinguished between conspiracies which have as their object an offense which is a felony and conspiracies which have as their object an offense which is a misdemeanor: If the offense is a felony, the maximum sentence is five years. "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371. In Section 371 cases, when an object offense could be a felony or a misdemeanor depending on a particular threshold fact, the Courts of Appeal have long required

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[7] The elements of the offense of Section 846 include an agreement to commit a criminal object or purpose and membership in that agreement; the statute does not require an overt act. *United States v. Shabani*, 513 U.S. 10, 16 (1994). This Court has expressly held that the act of agreeing to the commission of a particular offense itself provides the "actus reus" of the crime of narcotics conspiracy. *Id.*

that particular fact to be treated as an element of the offense which the *jury* must determine. *See, e.g., United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987). The same construction should apply to Section 846: as in Section 371, the definition of the offense "the commission of which is the object of the conspiracy" must include sufficient facts, such as the identity of the narcotics, to determine the range of statutory penalties applicable to the conspiracy. Because Section 371 had existed in its present form for over twenty years when Congress chose to use that same language in Section 846, it is reasonable to conclude that Congress intended the jury to play the same role in Section 846 cases that it plays in Section 371 cases in deciding the threshold facts which determined the nature of the criminal agreement and the range of penalties Congress provided for that agreement.

This understanding of Section 846 also explains why Congress deemed it necessary for the government to give defendants notice of a prior drug conviction via a separate information, before relying on such a conviction to enhance a defendant's sentence, but did not require such a special procedure for other sentencing-determining factors, such as the type of drugs. 21 U.S.C. § 851(a) ("No person convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon."); *see also United States v. Steen*, 55 F.3d 1022, 1025-28 (5th Cir.) (holding that because "repeat offenders face significantly harsher sentences than do first offenders, Congress intended that defendants receive notice of the prior convictions on which the court is relying.") (citations omitted), *rehearing and suggestion for rehearing en banc denied by* 66 F.3d 324 (5th Cir. 1995), and, *cert. denied*, ___ U.S. ___, 116 S. Ct. 577 (1995). Congress assumed, as remains the prevailing practice, that the indictment identifying the substantive

offense which was the object of the conspiracy would also identify the type of narcotics at issue in the conspiracy charge.[8] Therefore, Congress understood Section 846 to incorporate the object offense with sufficient specificity to

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[8] For cases in this Court under Section 841 and its predecessors in which the terms of the indictment were discussed or quoted, and in which the indictment named the drug in question, *see, e.g., United States v. Ursury*, ___ U.S. ___, 116 S. Ct. 2135 (1996) (Marijuana); *United States v. Mezzanatto*, 513 U.S. 196 (1995) (Methamphetamine); *Custis v. United States*, 511 U.S. 485 (1994) (Cocaine); *Smith v. United States*, 508 U.S. 223 (1993) (Cocaine); *United States v. Padilla*, 508 U.S. 77 (1993) (Cocaine); *Kinder v. United States*, 504 U.S. 946, White, J., dissenting (1992) (Methamphetamine); *Wade v. United States*, 504 U.S. 181 (1992) (Cocaine); *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (Heroin); *United States v. Sokolow*, 490 U.S. 1 (1989) (Cocaine); *Bourjaily v. United States*, 483 U.S. 171 (1987) (Cocaine); *United States v. Johns*, 469 U.S. 478 (1985) (Marijuana); *Luce v. United States*, 469 U.S. 38 (1984) (Cocaine); *United States v. Karo*, 468 U.S. 705 (1984) (Cocaine); *United States v. Place*, 462 U.S. 696 (1983) (Cocaine); *United States v. Morrison*, 449 U.S. 361 (1981) (Heroin); *Cecil v. United States*, 444 U.S. 881, Brennan, J., dissenting (1979) (Cocaine); *United States v. Morrison*, 429 U.S. 1 (1976) (Marijuana); *United States v. Chadwick*, 433 U.S. 1 (1977) (Marijuana); *United States v. Mandujano*, 425 U.S. 564 (1976) (Heroin); *United States v. Peltier*, 422 U.S. 531 (1975) (Marijuana); *United States v. Dinitz*, 424 U.S. 600 (1976) (LSD); *United States v. Moore*, 423 U.S. 122 (1975) (Methadone); *Turner v. United States*, 396 U.S. 398 (1970) (Cocaine and Heroin named in separate counts); *Leary v. United States*, 395 U.S. 6 (1969) (Marijuana); *Sabbath v. United States*, 391 U.S. 585 (1968) (Cocaine); *Wong Sun v. United States*, 371 U.S. 471 (1963) (Heroin); *Jones v. United States*, 362 U.S. 257 (1960) (Heroin); *Harris v. United States*, 359 U.S. 19 (1959) (Heroin); *Gore v. United States*, 357 U.S. 386 (1958) (Heroin and Cocaine); *Giordenello v. United States*, 357 U.S. 480 (1958) (Heroin); *Roviaro v. United States*, 353 U.S. 53 (1957) (Heroin); *Walder v. United States*, 347 U.S. 62 (1954) (Heroin); *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916) ("Opium and salts thereof, to wit, one dram of morphine sulfate.")

identify its specific penalty provision, defendants would have constitutionally adequate notice of the maximum penalty a defendant faced from the face of the indictment itself.

2. Legislative History of Section 846

The recent statutory amendments to Section 846 support the Petitioners' interpretation. The immediate predecessor to this provision was also a single sentence and read as follows:

> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Congress amended this provision in 1988 and adopted the present language of Section 846 in order to accomplish two objectives: Congress' first objective was to ensure that mandatory minimum sentences for Section 841(a) violations, which were first adopted in 1986, would apply to those Section 846 conspiracies whose objectives were to distribute quantities and types of drugs which carried mandatory minimums. 134 Cong. Rec. 13,781-13,782 (1988).[9]

If the phrase "object of the offense" in Section 846 were meant only to apply to the broadest, generic description of the offense in Section 841(a)(1), then no legislative amendment would have been necessary to

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[9] Congress' second objective was to ensure that, other than the term of imprisonment, potential punishments such as special parole (now abolished), would apply equally to substantive offenses and to attempts and conspiracies which had as their objectives the commission of the substantive offense.

ensure application of the mandatory terms of imprisonment. Under the language of either the old or new version of Section 846, a defendant would be subject to the same imprisonment and fine up to the maximum penalties as provided in the substantive offense. *Bifulco v. United States*, 447 U.S. 381, 398 (1980) (relying on language of predecessor statute to conclude that Section 846 "authorizes two types of sanctions – fines and imprisonment – and fixes the maximum amount of each that may be imposed by reference to the penalty provisions of the target offense."). Likewise, given Congress' intention to have the mandatory minimums apply to Section 846 conspiracies, Congress must have intended to incorporate the type of controlled substance in its use of the phrase "object of the offense," because the minimums only apply to certain specific offenses of Section 841(a) – those involving Schedule I, II, and certain Schedule III substances – not to all Section 841 violations. A conspiracy or attempt to distribute certain Schedule III, IV or V controlled substances has no mandatory minimum sentence, and thus would not be affected by the amendment to Section 846. Congress' intent in changing the language of Section 846 was to ensure statutory penalties applied to attempts and conspiracies with objects to distribute a particular controlled substance, *i.e.*, Schedule I, II, and certain Schedule III offenses, and not *any* controlled substance. If the phrase "object of the attempt or conspiracy" meant *any* violation involving *any* controlled substance, no legislative amendment would have been necessary to accomplish that purpose.

The broader context from which Section 846 arose further confirms Petitioners' construction of the statutory language. Congress intended the Comprehensive Drug Abuse Prevention and Control Act of 1970 to combine the various earlier drug laws already in existence at that time. *See* David F. Musto, *The American Disease: Origins of Narcotic Control* 261 (1987). These earlier laws addressed particular drugs or groups of drugs, and convictions

under these laws required the identification of the drugs at issue. For example, the Harrison Narcotic Drug Act, Ch. 1, 38 Stat. 785 (1914), regulated the production and use of opium and coca leaves; the Narcotic Drugs Import and Export Act of 1922, Ch. 202, 42 Stat. 596, controlled the production and use of cocaine; the Marijuana Tax Act of 1937, Ch. 553, 50 Stat. 551, regulated the use and production of marijuana. Other statutes regulated the use and production of synthetic opiates, hallucinogens, barbiturates, and tranquilizers. *See* Kathleen F. Brickey, *The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1148-50 (1995). Thus, Congress has long recognized that different substances cause different levels of harm to society, and sought to address these different problems through discrete laws with proportionate punishments. While the 1970 Act reorganized the various laws into a more comprehensive scheme, it took this long-held recognition into account, placing drugs into different schedules corresponding to the degree of harm caused by each drug. *See Chapman v. United States*, 500 U.S. 453, 460 (1991); *Neal v. United States*, 516 U.S. 284 (1996). Subsequent amendments to the 1970 Act have continued to treat the mishandling of different drugs as different offenses. Through the 1980's, Congress enacted mandatory minimum sentences triggered by the quantity and type of drug involved. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1249 (1996). This historical trend continued with the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, which created the federal law distinction between powder cocaine and cocaine base and set mandatory minimums. Nothing in the legislative history or express provisions of the 1970 Act suggest that, in recodifying and clarifying the narcotics statutes, Congress intended to change the jury's historical role in determining the threshold facts, including the type of drugs involved, which have distinguished one drug crime, and its penalties, from another.

3. The Petitioners' Interpretation of Section 846 Is Consistent with General Conspiracy Principles

The Petitioners' interpretation of Section 846 is fully consistent with and supported by this Court's cases clarifying the law of conspiracy. The agreement to commit the crime that is the object of the conspiracy is the essence of a conspiracy violation. *Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."). The conspiracy statute punishes the mere agreement to commit the object offense. *Salinas v. United States*, No. 96-738, 1997 WL 737692, *9 (U.S. Dec. 2, 1997) ("It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself."), *cert. denied sub nom. Marmolejo v. United States*, No. 96-7960, 1997 WL 82138 (U.S. Dec. 8, 1997). Conspiracy is itself a distinct offense and may be punished separately and consecutively with the object offense without offending the double jeopardy clause. *United States v. Felix*, 503 U.S. 378, 388-92 (1992); *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

This Court has ruled that the agreement in a Section 846 narcotics conspiracy is an "indisputably essential element of the offense." *Shabani*, 513 U.S. 10, 16 (1994). Moreover, "[t]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes." *Braverman v. United States*, 317 U.S. 49, 53 (1942). In finding a defendant guilty of a conspiracy, a jury must determine what unlawful objective a particular defendant actually agreed to commit.

In the case of a narcotics conspiracy, the identity of the drug is a central feature of the agreement. Congress has recognized this fact by providing vastly different

penalties for different drugs. As Congress has announced, a powder cocaine conspiracy is generally *not* the same as a crack cocaine conspiracy. A defendant charged with agreeing to distribute particular narcotics has thus agreed to commit that unlawful objective, and not just *any* drug conspiracy.

The government's position leads to results that cannot be squared with the principle that the essence of a conspiracy charge is the particular illegal agreement each defendant has made or entered. If the government's position were correct – that Congress only intended to require that the jury find an agreement to distribute just *any* controlled substance – the government could charge and prosecute a bare Section 846 violation without in any manner specifying the object offense or the identity of the drug in question. At trial, the government could present evidence of any of several drugs as it liked, and never have to present the jury with any particular, specific or definitive theory of the case. The jury would be instructed that it must convict if the jurors accepted any of the evidence, and the jury may not determine whether the defendants agreed on any particular object among the possibilities presented. Similarly, if the government's position were correct, the government could submit the identity of the controlled substance in a special interrogatory, then ignore the result if, for example, it turned out the verdict could not rest on the particular controlled substance found by the jury. For example, a defendant might show on appeal that he was lawfully permitted to distribute one of two narcotics charged in a conspiracy count on which the jury rendered a general verdict. Under the government's interpretation of Section 846, such a legal defect in the ambiguous verdict would be irrelevant and the verdict should stand. Such results contravene the basic requirements set forth in this Court's cases defining conspiracies as agreements which embrace specific illegal objectives.

4. Petitioners' Construction Provides a Consistent Role for the Jury in Deciding Section 846 Cases

The government concedes, as did the Seventh Circuit below, that Congress intended the jury to determine whether the defendant violated Section 846 by, for example, conspiring to commit a Section 841 crime versus some other object offense, such as a Section 843(b) violation. *See Edwards*, 105 F.3d at 1181 (agreeing that the court may not sentence on the more serious object of a multi-object conspiracy where the different objects appear in separate statutory provisions of the criminal code). There is simply no basis to believe, however, that Congress intended the jury to specify the object of a Section 846 offense where the charge identifies two different statutory provisions carrying different penalties (such as Sections 841(a) and 843(b)) as the object of the conspiracy, but not where the Section 846 charge identifies two different controlled substances carrying two vastly different penalties specified in different subsections of Section 841(b). Congress expressly incorporated the object of the conspiracy into the definition of the Section 846 violation. In the case of a Section 841(a) object, the Section 846 violation necessarily must specify the threshold facts to identify the statutory penalty range under Section 841, in exactly the same way it necessarily must incorporate the threshold facts to satisfy any distinct section of the Criminal Code, such as Section 843(b), as the object offense in the Section 846 conspiracy.

Petitioners' interpretation of Section 846 provides a consistent role for the jury in both kinds of Section 846 cases: those charging multiple sections of the Criminal Code as objects and those charging multiple drugs under Section 841. In contrast, the government's interpretation rests on drawing an insupportable distinction between Section 846 cases which have object offenses and penalties described in one section or subsection of the criminal code, and Section 846 cases which have object offenses and penalties divided in multiple subsections of the

Criminal Code. Nothing in the language or purpose of Section 846 indicates Congress' intent to distinguish the role of the jury in determining a defendant's guilt in conspiracies to violate Section 846.

5. The Government's and Seventh Circuit's Interpretation Would Constitute a Constructive Amendment of the Indictment in this Case

The Seventh Circuit agreed with the government's position below that the indictment and general verdict in this case established that Petitioners were convicted of conspiracy to commit the "one crime" of distributing narcotics. *See Edwards*, 105 F.3d at 1181 (majority of dual object conspiracy cases "have nothing to do with an indictment that charges the defendants with agreeing to commit *one crime* in *two ways*.") (emphasis in original). The Seventh Circuit's interpretation of the offense of conviction in this case as a single conspiracy to violate one statute, however, diverges from, and would constitute an amendment to, the offense that was actually charged to the jury.[10]

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[10] The Seventh Circuit's explanation that "[w]hat a jury believes about which drug the conspirators distributed therefore is not conclusive – and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options" is demonstrably incorrect. *Edwards*, 105 F.3d at 1181. A defendant convicted of a conspiracy to sell 1 gram of crack cocaine is subject to a maximum penalty of not more than 20 years. 21 U.S.C. § 841(b)(1)(C). A defendant convicted of conspiracy to sell 50 grams of crack cocaine is subject to a maximum penalty of not more than life imprisonment. 21 U.S.C. § 841(b)(1)(A)(iii). If a defendant were charged with two counts of conspiring to sell 1 gram and 50 grams respectively, but was acquitted of the 50 grams count, the maximum penalty the defendant could receive would be 20 years, the offense of conviction, no matter what the district court determined was relevant conduct and even if the court

The nature of the conspiracy alleged is determined from an examination of the four corners of the charging instrument. "The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction." *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978) (ellipsis and alterations in original, internal quotations omitted). Another Constitutional reason for requiring that the jury find only what is charged in the indictment is to enforce the Grand Jury Clause of the Fifth Amendment. In this case the government chose to seek a grand jury indictment naming two specific controlled substances in a single indictment. (J.A. 4-7). The government cannot now defend the conviction and sentences imposed on the grounds that the jury found a broader, different conspiracy to distribute controlled substances generally. *Stirone v. United States*, 361 U.S. 212 (1960); *see also United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir.) ("[T]he government through its ability to craft indictments, is master of the scope of the charged RICO conspiracy. . . . having set the stage, the government must be satisfied with the limits of its creation"), *cert. denied sub nom. Messino v. United States*, 479 U.S. 939 (1986).

In *Stirone*, the defendant was charged with a Hobbs Act interference with commerce by means of threats

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relied upon the acquitted conduct. Cf. *United States v. Watts*, ___ U.S. ___, 117 S. Ct. 633 (1997); *see United States v. Carrozza*, 4 F.3d 70, 81 (1st Cir. 1993) (statutory maximum sentence for RICO offense must be determined by conduct alleged in the indictment), *cert. denied sub nom. Patriarca v. United States*, 511 U.S. 1069 (1994). The jury's determination is thus critical in setting forth the maximum punishment allowed under the statute and the sentencing court would be restricted in its sentencing options.

affecting the importation of sand and other materials used in ready-mix concrete. 361 U.S. at 214. The trial judge admitted evidence of interference with shipment in interstate commerce of prospective steel products and charged the jury that its finding of guilt could rest on either the interference with sand importation or prospective steel product. *Id.* This Court concluded that the jury charge improperly permitted the defendant to be convicted on an offense not presented to the grand jury and therefore constituted a constructive amendment to the indictment. *Id.* "[W]hen only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." *See also United States v. Miller*, 471 U.S. 130, 145 (1985) (a broadening of the indictment through removal of allegations "essential to the offense on which the jury convicted" constitutes an impermissible constructive amendment).[11]

A recent decision of the United States Court of Appeals for the Second Circuit reaches the same result. In *United States v. Wozniak*, 126 F.3d 105, 108-09 (2d Cir. 1997), the Second Circuit held that instructing the jury that it could find the defendant guilty of a conspiracy to possess with intent to distribute "a controlled substance containing cocaine and methamphetamine" if it found

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[11] *See also United States v. Leichtnam*, 948 F.2d 370, 379-80 (7th Cir. 1991) (conviction for violating 18 U.S.C. § 924(c) premised on an indictment which identified the use and carrying of a specific identified firearm, cannot be supported on the possession of a different firearm without violating *Stirone*); *United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990) (RICO conspiracy indictment identifying the RICO enterprise as the "DeCavalcante Family" required the government to prove that enterprise and not just any enterprise).

"some controlled substance" constituted a constructive amendment of the indictment. In *Wozniak*, the evidence of the defendant's participation in a motorcycle gang drug ring exclusively involved marijuana, although the gang's drug activities involved cocaine, methamphetamine, and marijuana. *Id.* at 107-08. The government argued that Wozniak's participation with any kind of controlled substance would suffice because the type of controlled substance is not an element of the offense of narcotics conspiracy. *Id.* The trial court agreed and so instructed the jury. The Second Circuit reversed, concluding that the jury instructions constituted an "impermissible constructive amendment to the indictment." *Id.* The *Wozniak* court focused on the lack of notice to the defendant of the marijuana charges and emphasized that the conspiracy was wide-ranging, spanning one and a half years based on a large set of "operative facts."[12] *Id.* at 111.

The nature of the agreement between the Petitioners is not mere surplusage but is the core essential element the government had to prove beyond a reasonable doubt. To accept the Seventh Circuit's understanding of the agreement which constituted the offense of conviction in

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[12] The facts of the *Wozniak* case highlight perfectly the hidden dangers in multiple object conspiracies. Although defendant Wozniak was associated with members of the motorcycle gang, some of whom had extensive dealings in cocaine and methamphetamine, Wozniak's involvement was exclusively related to providing marijuana to these associates. *Wozniak*, 126 F.3d at 110-11. Had the government charged him in a multi-object conspiracy with marijuana, cocaine, and methamphetamine as its objects, a general verdict of guilty, under the government's view, would have exposed Wozniak to the mandatory minimums and maximums of those drugs, increasing his penalties based on a quantity ratio of 1000 to 1. *Compare* 21 U.S.C § 841(b)(1)(A)(vii) (requiring 1000 kilograms of a mixture containing marijuana) *with* 21 U.S.C. § 841(b)(1)(A)(viii) (requiring 1 kilogram of a mixture containing methamphetamines).

this case as simply an agreement to distribute controlled substances would constitute a constructive amendment and an impermissible broadening of the indictment in violation of this Court's decisions in *Stirone* and *Miller*. Thus, the government cannot avoid the ambiguity created by the general verdict in this case, by assuming the conviction rested on a ground not charged in the indictment or presented to the jury.

6. The Government's Position Advanced Below is Inconsistent with its Position, and this Court's Rulings, in Double Jeopardy Cases

The government argued in this case that a Section 846 count alleging multiple controlled substances constitutes a charge of conspiracy to commit a single offense, the distribution of any controlled substance under Section 841(a). The government's position in this case contradicts the position it has advocated, and the courts have generally accepted, that a defendant can be charged, found guilty, and cumulatively punished for multiple Section 841(a) offenses based on simultaneous possession with intent to distribute multiple types of controlled substances. *See, e.g., Richardson*, 86 F.3d at 1551; *United States v. Bonilla Romero*, 836 F.2d 39, 46-47 (1st Cir. 1987), *cert. denied*, 488 U.S. 817 (1988); *United States v. DeJesus*, 806 F.2d 31, 35-37 (2d Cir. 1986), *cert. denied*, 479 U.S. 1090 (1987); *United States v. Grandison*, 783 F.2d 1152, 1155-56 (4th Cir. 1981).

In these prior cases, the government claimed that Congress intended multiple punishments be imposed for the simultaneous possession of multiple drugs because possession of each drug constitutes a distinct crime under Section 841(a)(1). The government has argued that Congress intended the identity of the specific controlled substance to define separate criminal offenses under Section 841(a). The Courts of Appeal have accepted this argument and have held that such charges do not violate the

defendant's Double Jeopardy rights, because Congress provided that different drugs constitute different offenses under Section 841(a) even when the underlying facts supporting the conviction, such as time, place, participants, and mental state are identical. *Richardson, supra; DeJesus, supra.* Under these established principles and cases, then, a conspiracy to violate Section 841(a) by possessing with intent to distribute multiple drugs is *not* a conspiracy to commit *"one crime* in *two ways," Edwards,* 105 F.3d at 1181. In determining the statutory range of punishment, the District Court may consider only the *offense of conviction. See, e.g., United States v. Estrada,* 42 F.3d 228, 232 & n.4 (4th Cir. 1994); *United States v. Winston,* 37 F.3d 235, 240-41 (6th Cir. 1994); *United States v. Darmand,* 3 F.3d 1578, 1581 (2d Cir. 1993). The jury's verdict, therefore, must establish the offense of conviction on which the District Court will impose sentence, including the distinct statutory objects defined with respect to different drugs.[13]

This Court's recent decision in *Witte v. United States,* 515 U.S. 389 (1995), supports the Petitioners' construction of Section 846. In *Witte,* the defendant was charged with conspiring and attempting to possess 1000 pounds of marijuana with intent to distribute it in violation of 21 U.S.C. §§ 846 and 841(a)(1). Witte pleaded guilty to the attempted possession charge, but pursuant to the relevant

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[13] In other cases, the Seventh Circuit has observed the distinction between the offense of conviction and relevant conduct. *United States v. Lewis,* 110 F.3d 417 (7th Cir.) (statutory penalty looks to drugs involved in offense of conviction), *cert. denied,* ___ U.S. ___, 118 S. Ct. 149 (1997); *United States v. Rodriguez,* 67 F.3d 1312, 1324 (7th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S. Ct. 1582 (1996). *But see United States v. Reyes,* 40 F.3d 422, 427 (10th Cir. 1994) (Tenth Circuit rule requires court to consider all relevant conduct in fixing the statutory penalties and not merely drugs identified in offense of conviction).

conduct provisions of the Sentencing Guidelines, his sentence also took account of the importation of 1000 kilograms of cocaine and an additional marijuana shipment. *Witte,* 515 U.S. at 394. Witte was subsequently charged with the cocaine importation conspiracy based on the same facts of the relevant conduct as had given rise to the increase in his prior Guideline sentence. In concluding that the second prosecution did not constitute a second punishment in violation of the double jeopardy clause, this Court distinguished *the offense of conviction* from *relevant conduct* under the Sentencing Guidelines and held that the Double Jeopardy clause prohibits multiple punishment "only for the offense of which the defendant is convicted." *Id.* at 397. The drug transactions charged in the second trial merely constituted "evidence of related criminal conduct to enhance a defendant's sentence for a separate crime" charged in the first trial, even though by definition they arose out of the same common course of dealing as the offense charged in the first trial. *Id.* at 399. The two acts with two separate drugs constituted *separate crimes,* even though they were part of a single course of conduct. Similarly, in *United States v. Watts,* ___ U.S. ___, 117 S. Ct. 633 (1997) (*per curiam*), the Court held that a sentencing court may consider at a sentencing hearing evidence of acquitted conduct to enhance a defendant's sentence under the Sentencing Guidelines, because, as in *Witte,* the two courses of conduct (possession with intent to distribute cocaine and using a firearm in relation to that same drug offense) constituted distinct crimes, even though they were carried out simultaneously, in the same place, and as part of the same course of conduct.

This Court's decisions in *Witte* and *Watts,* and the lower courts' decisions in the Double Jeopardy cases cited above, collectively demonstrate that the offense of conviction under Section 846 is identifiable by the particular drug distributed or possessed. In these decisions, the courts have identified the count of conviction in a drug case as not involving simply "any controlled substance"

(which would have included related acquitted conduct or relevant conduct), but only the drugs and quantities identified in the indictment. In all other cases, the government seeks to *exclude* from its definition of the offense of conviction other related drug activities, so it can justify multiple prosecutions and punishments. In the present case, the government takes the opposite course in order to achieve a different result on the same facts. Here, the government seeks to *include* in its definition of the offense of conviction conduct related to any controlled substance (including amount and types of drugs) by defining the offense as simply a conspiracy to distribute *any* controlled substance. The government's current definition of the offense of conviction directly conflicts with its position in *Witte*, *Watts*, and other Double Jeopardy cases and should be rejected. The Seventh Circuit's decision in *Edwards* failed to recognize this fundamental divergence between its construction and the Double Jeopardy cases.

7. Petitioners' Interpretation of Section 846 Avoids a Sentencing Process That Would Violate Defendants' Sixth Amendment and Due Process Rights to a Jury Determination on Every Element of the Crime

The agreement reached among and between co-conspirators is an essential element of the offense of a Section 846 conspiracy. *Shabani*, 513 U.S. at 16. What the Petitioners agreed to do in violation of the law is a fact-based determination the government has a fundamental constitutional obligation to prove beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Moreover, the Fifth Amendment Due Process clause and the Sixth Amendment right to a jury trial "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Thus, the Petitioners are entitled to

have the jury determine what illegal agreement the Petitioners formed and agreed to participate in. *Sullivan*, 508 U.S. at 277 (Sixth Amendment right "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' ").

The Petitioners' Fifth and Sixth Amendment rights to a jury determination of all the essential elements of the offense is defeated in this case unless the Petitioners are sentenced on the agreement carrying the lesser punishment. If the government had charged the agreement to distribute cocaine in Count One and the agreement to distribute cocaine base in Count Two, a jury would consider and determine what the agreement between and among Petitioners was and whether each Petitioner joined which conspiracy. A jury finding of guilty on both counts as to each Petitioner would mean that the jury had determined each of the two essential elements – agreement and membership – as to each charged conspiracy and each Petitioner. A finding of guilty as to one count (cocaine conspiracy) but not guilty as to the other (cocaine base conspiracy) would mean that the jury considered the essential elements – agreement and membership – as to each count. A sentencing court could not, consistently with this Court's decisions in *Gaudin* and *Sullivan*, find one of the Petitioners guilty, even if convinced based on the evidence introduced at trial beyond a reasonable doubt, of the conspiracy charge of which the jury found the Petitioners not guilty. To do so would invade the province of the jury in violation of the Petitioners' Fifth and Sixth Amendment rights.[14]

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[14] The same result would be true even if the jury could not decide whether a particular defendant was a member of one conspiracy but found the defendant guilty of the other conspiracy. A sentencing judge could not permissibly conclude the defendant was guilty of the second count.

In this case, the jury's determination of guilt as to Count One could mean that the jury found that each of the Petitioners was a member of a cocaine base conspiracy, or each was a member of a cocaine conspiracy, or each was a member of a conspiracy with both objectives.[15] The general verdict means that the jury found each of the Petitioners guilty of some aspect of the conspiracy charged in Count One. The government's decision to charge the conspiracy in the manner it did deprives the Petitioners of a jury determination on which agreement the jury found existed and of which agreement the individual Petitioners were members. The sentencing court may not make the determination either of what the nature of the agreement was or what its essential object was as a matter of guilt even if it could consider evidence of the other conspiracy in deciding what sentence to impose.

8. Petitioners' Interpretation of Section 846 Avoids a Sentencing Process That Would Violate Defendants' Sixth Amendment and Due Process Rights to a Unanimous Jury Determination on Every Element of the Crime

The government's construction of Section 846, and the lower courts' decisions, would violate Petitioners' Sixth Amendment and Due Process rights to a unanimous jury verdict on the offense of conviction. As explained above, the general verdicts on the conspiracy count as to each Petitioner do not necessarily reflect a unanimous jury verdict that each Petitioner conspired to distribute powder cocaine, cocaine base, or both. Indeed, in light of

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[15] Of course, the jury might have concluded as well that some of the defendants were members of one conspiracy but not the other and thus were guilty of Count One, while the remaining defendants were members of the other conspiracy, but not the former and thus guilty of Count One.

the District Court's instructions, the jury may well have believed that it did not even have to consider whether all jurors agreed on the identity of the controlled substance in question and, therefore, may never have addressed the identity of the controlled substance in its deliberations. The sentences, however, assumed that the offense of conviction was conspiracy to distribute cocaine base. The interpretation of Section 846 adopted below, which permitted the District Court to assume that the offense of conviction included conspiracy to distribute cocaine base, would violate Petitioners' Sixth Amendment and Due Process rights, because the identity of the controlled substance must be treated as an element of a Section 846 conspiracy charge on which the defendant has the right to a unanimous verdict. Petitioners' construction of Section 846 would avoid these constitutional defects.

Federal criminal defendants indisputably have the right to a unanimous jury verdict under the Sixth Amendment and Rule 31(a) of the Federal Rules of Criminal Procedure. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). As Justice Powell explained, "[a]t the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *See* 406 U.S. at 371 (footnotes omitted) (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*). It is equally well-established that a criminal defendant is entitled to a determination of every element of a charged offense. *In re Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") It follows, then, that the Sixth Amendment entitles a federal criminal defendant to be sentenced on the basis that the offense of conviction is a

crime as to which the jury has unanimously determined all elements of that offense. A defendant's sentence based on an offense as to which the verdict does not establish the jury unanimously found all elements of the offense is unconstitutional. Since the verdict in the present case does not establish the jury unanimously found the object of the Count One conspiracy included cocaine base, the sentences are unconstitutional if the identity of the controlled substance in this case was an element of the Section 846 offense.

The identity of the controlled substance must be treated as an element of the Section 846 conspiracy charge for three reasons: (a) Congress intended that the jury determine the identity of the controlled substance in a Section 846 prosecution, (b) historical precedent supports treating the identity of the controlled substance as an element of the offense, and (c) the vastly different penalties associated with different drugs supports construing the identity of the narcotics as an element of the offense. Moreover, even if Congressional intent were only ambiguous, the rule of lenity would require the Court to treat the crime carrying the lesser penalty as the offense of conviction in the presence of an ambiguous Section 846 verdict.

In *Schad v. Arizona*, 501 U.S. 624 (1991), a plurality of this Court held that the question whether a particular issue must be decided unanimously by the jury is in the first instance a matter of legislative intent. Where the legislature intended the offense to include the specification of a given set of facts – in this case, the identity of the controlled substance – then the defendant has a constitutional right to have that fact decided unanimously by the jury. *Id.* at 630-31. Put another way, where the legislature intended two or more alternative sets of facts to establish multiple crimes, rather than just different ways to commit the same crime, then the defendant has the right to a unanimous jury verdict on the facts necessary to define the crime. In *Schad*, this Court addressed an

Arizona statute which defined first degree murder as either premeditated murder or felony murder. At trial in the case, the state had presented theories both of premeditated and of felony murder, and the jury's general verdict did not specify the theory on which it convicted; nor did the verdict demonstrate that the jury was unanimous in accepting either one theory or the other. This Court held that the ambiguous verdict did not violate the defendant's constitutional right to a unanimous jury verdict. The Court held first that the state legislature had the power to define the crime of first degree murder as a single crime, which could be committed in either of two different ways, in order not to require the jury to specify the manner in which the crime was committed. 501 U.S. at 628-29. The Court then relied upon the fact that the Arizona Supreme Court had already conclusively construed the first degree murder statute and had held that the statute was intended to define a single crime on which the jury need not reach a unanimous verdict on the specific means by which it was committed. *Id.* at 629. In *Schad*, therefore, the Court's holding rested upon the premise that the legislature had written the statute in question in order to define a single crime encompassing murder either by premeditation or in the course of a felony.

Here, in contrast to *Schad*, there is no legislative statement, either in the terms of Section 846 or in any legislative history, that Congress intended to define a Section 846 conspiracy to distribute controlled substances as a conspiracy to commit a single crime on which the jury would not determine the identity of the controlled substance in reaching its verdict. Here – unlike in *Schad* – there is no legislative mandate that the issue be taken from the jury. In addition, *Schad* addressed only the validity of the conviction, not the imposition of penalties,

and the Arizona first degree murder statute did not provide different penalties for premeditated and felony murder – much less the vastly different penalties possible for a Section 846 conspiracy.

The government's position here, moreover, conflicts with this Court's reasoning in *Griffin v. United States*, 502 U.S. 46 (1991). The government rests its argument on the premise that the Section 846 count in this case was a conspiracy to commit a "single crime" – a violation of Section 841(a). This premise cannot be squared with the Court's analysis in *Griffin*.

In *Griffin*, the Court upheld a Section 371 conspiracy to defraud an agency of the federal government by impairing the efforts of the Internal Revenue Service and the Drug Enforcement Agency ("DEA"). The conspiracy to defraud charge under Section 371 does not specify the identity of the federal agency which was the object of the fraud, and sentences imposed for violations of Section 371 do not vary depending on which agency was defrauded. The *Griffin* jury returned a general verdict. On appeal, the defendant showed that there was insufficient evidence to convict him of conspiring to defraud the DEA. 502 U.S. at 47-48. The Court ruled that the verdict could stand, because the insufficiency in the charge of conspiracy to defraud the DEA was merely *factual*, not *legal*. *Id.* at 55-58. The court contrasted the case before it with the line of decisions represented by *Yates v. United States*, 354 U.S. 298 (1957), where the Court held that where one of the objects of a multi-object conspiracy on which a defendant is convicted by a general verdict is *legally* insufficient (either on constitutional or statutory grounds), the conviction cannot stand. *Id.* at 51-58. In *Griffin*, the Court explained that the difference between decisions like *Yates* and decisions like *Griffin* is that in the case of factual insufficiency the courts can assume the jury reached its verdict on the basis of the object for which there was sufficient evidence, whereas in the case of legal insufficiency the courts cannot assume the jurors

unanimously picked the legally sufficient object as the basis of conviction. *Id.* at 59. In *Griffin*, therefore, had the defect in the charged conspiracy to defraud the DEA been *legal*, rather than factual, the conspiracy charge would have been constitutionally infirm, because the court could not determine that the jury reached a unanimous verdict.

On the government's view of Section 846 in this case, however, the entire decision in *Griffin* should have been unnecessary and irrelevant, because the *Griffin* defendants were found guilty of conspiring to commit a *single unlawful objective* (to defraud a federal agency) in two ways. On the government's view the defendant should have had no right to a unanimous jury verdict specifying the object of the offense. On the government's view, the Court in *Griffin* need merely have pointed out that the defect in one possible object of the conspiracy – regardless of whether the defect was legal or factual – simply had no bearing on the validity of the verdict. Contrary to the government's position here, *Griffin* stands for the proposition that the conspiracy defendant *does* have the right to a unanimous jury determination that he committed at least one of the object offenses in a multi-object conspiracy. For this purpose, Sections 371 and 846 are indistinguishable. The government's position here, therefore, contradicts the very basis or foundation of the Court's decision in *Griffin*.

Applying the principles set forth in *Griffin* to the sentencing determination, the present case is analogous to the legal infirmity cases represented by *Yates*, rather than the factual infirmity cases represented by *Griffin*. As in the legal infirmity cases, there is no basis here to infer that the jury could rationally have rested its verdict *only* on either cocaine base or powder cocaine. There was sufficient evidence to support either basis for the verdict. Here, as in the legal infirmity cases, no inference can be drawn from the verdict as to the object or objects – if any – on which the jury unanimously agreed in reaching its

verdict. In addition, Congress in Sections 841 (and in other sections which can be the basis for a Section 846 conspiracy) drew numerous *legal* distinctions among different kinds of narcotics, whereas in *Griffin* there was no *legal* distinction between conspiracy to defraud the DEA and conspiracy to defraud the IRS.

Finally, even if the Court finds that the legislative intent regarding the definition of a Section 846 offense is itself unclear or ambiguous from the language and history of the statute, the Court should still conclude that the identity of the controlled substance must be decided by a unanimous jury. In analyzing the right to a unanimous jury verdict where the legislative intent is unclear, courts should look to background considerations of (a) history, (b) the existence of highly disparate penalties, and (c) the rule of lenity. *See Schad*, 501 U.S. at 637. All these considerations argue that the identity of the narcotics in a Section 846 conspiracy case be decided by unanimous jury verdict.

The history of federal drug offense laws is especially telling. Prior to enactment of Section 841, the federal controlled substances laws were scattered throughout the code and, in most instances, separate substances were targeted and sentenced separately. As discussed above, Section 841 was the result of Congress' effort to organize the various existing substance laws into one section. In doing so, Congress retained the distinctions between different drugs and did nothing to suggest it intended to change the role of the jury when it changed the organization or groupings of the offenses into the various sections and subsections in the Criminal Code that exists today.

In addition, the penalties imposed under Section 841 vary according to the identity of the drugs involved. The vast differences in sanctions, in the absence of any legislative mandate to the contrary, strongly suggest Congress intended to have the jury determine the identity of the drugs in a Section 846 case.

Finally, the rule of lenity, which requires the construction of an ambiguous criminal statute in favor of the defendant, should operate to require jury unanimity on the identification of the narcotics to support sentencing in a multi-object conspiracy like the present case. This Court has applied the rule of lenity to the penalties imposed for criminal acts. *United States v. Granderson*, 511 U.S. 39 (1994); *accord Bifulco v. United States*, 447 U.S. at 400; *Ladner v. United States*, 358 U.S. 169, 178 (1958). Therefore, assuming Congressional intent is found to be unclear, the rule should be applied here to construe Section 846 to require the district court to sentence in multi-count conspiracy cases on the offense of conviction which carries the lesser penalty range.

9. The Seventh Circuit's Interpretation of Section 846 Would Lead to Violations of the Due Process Right to Timely Notice of the Maximum Statutory Penalty for an Offense

The government's and the Seventh Circuit's interpretation of Section 846 raises serious Due Process notice concerns. In its decision, the Seventh Circuit claims that a Section 846 indictment can charge conspiracy to distribute controlled substances "without identifying either the substances or the quantities." *Edwards*, 105 F.3d at 1181. This view of Section 846, however, deprives defendants of timely and effective notice of the maximum statutory penalties they face in violation of this Court's Due Process decisions.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589, 1598 (1996); *see also Miller v. Florida*, 482 U.S. 423 (1987) (Ex Post Facto Clause violated by retroactive imposition of revised sentencing guidelines

that provided longer sentence for defendant's crime); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Therefore, "vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *see also United States v. Brown*, 333 U.S. 18 (1948).

Specifically, this principle entitles a defendant to actual notice of the maximum penalty for the specific conduct charged. Therefore, one species of the Due Process notice problem arises where a statute includes multiple prohibited acts, each with different maximum penalties. Such statutes, and indictments under these statutes, must clearly specify which penalty provision goes with which each criminal act to avoid a Due Process infirmity. For example, in *United States v. Evans*, 333 U.S. 483 (1948), a federal statute clearly criminalized the act of "concealing and harboring aliens" but it also contained a variety of other prohibited acts and penalty clauses. Because the statute did not clearly indicate which penalty was intended for "concealing and harboring," the Court dismissed the indictment. In so holding, the Court stated that determining the correct maximum punishment for particular acts within a single statute was "a task outside the bounds of judicial interpretation." *Id.* at 495.

This Due Process right to notice of the maximum statutory penalty has not been altered by *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, a state statute provided that anyone convicted of certain felonies was subject to a mandatory minimum sentence of five years if the court found at sentencing that the defendant had visible possession of a firearm during the offense. The Court rejected a challenge that this sentencing factor had to be considered an element of the offense which required proof beyond a reasonable doubt under *In re Winship*, 397 U.S. 358. Critical to the Court's reasoning, however, was the fact that the firearm statute did not alter the statutory maximum penalty for each enumerated

offense committed. 477 U.S. at 87. In fact, the Court noted that the "maximum penalties for those offenses were established long before [the firearm statute] was passed." *Id.* at 86. Thus, whether or not a judge found that a firearm was involved in the offense, the statutory maximum for the underlying enumerated offense did not change. While not explicitly raised in *McMillan*, the Pennsylvania statute was also constitutional because the defendant had notice before trial of the statutory maximum for the underlying offense of conviction. A post-trial judicial determination of the statutory maximum, which this Court in *McMillan* noted might present a *Winship* issue, would also have presented a Due Process notice issue.

In this case, the Seventh Circuit's interpretation of Section 846 creates both notice and *Winship* problems. Allowing the government to indict without any reference to the threshold facts needed to determine which statutory maxima in Section 841(b) will apply deprives the defendant of meaningful notice of the maxima in his case. Under *Evans*, resort to the greatest statutory maximum for any act in the statute is simply insufficient to inform the defendant of the acts for which he was indicted and the statutory maximum he faces.[16]

Furthermore, actual notice of the maximum is futile unless the notice is also timely. In a variety of contexts, that means that the defendant is entitled to actual notice of the maximum penalty he may suffer before the proceeding that can impose that punishment begins. *See Lankford v. Idaho*, 500 U.S. 110 (1991) (reversing death

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[16] Some lower courts have misunderstood *McMillan's* distinction between statutory maxima and mandatory minima. For example, the Eleventh Circuit had held prior to the *McMillan* decision that in a dual object conspiracy a court must sentence on the object that carries the lesser statutory penalty. *See United States v. Alvarez*, 735 F.2d 461 (11th Cir. 1984); *but see United States v. Perez*, 960 F.2d 1569, 1574-75 (11th Cir. 1992).

penalty case where judge imposed death penalty at sentencing without notice to defendant and in disregard of the prosecutor's stated intention not to seek the death penalty). For example, a plea is invalid unless the defendant is made aware of the statutory maximum to which he is exposed before the plea is taken. *McCarthy v. United States*, 394 U.S. 459, 467 (1969); *United States v. Coscarelli*, 105 F.3d 984 (5th Cir. 1997) (trial court must advise defendant at plea hearing of maximum sentence for each object of conspiracy when defendant pled guilty to multi-object conspiracy); *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990) (prior to guilty plea, defendant entitled to notice of applicability of recidivism statutes that increase maximum penalty), *cert. denied*, 498 U.S. 1093 (1991); *accord United States v. Siegel*, 102 F.3d 477 (11th Cir. 1996).[17] Similarly, a defendant who invokes his right to trial by jury has a right to receive notice before trial of the statutory maximum he faces for that offense.[18] Just as a

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[17] Even in the context of the Sentencing Guidelines where sentencing takes place entirely within a statutory maximum, the Court has held that a defendant was entitled to notice of the judge's intent to depart upwards from the Guidelines before the sentencing proceeding began. *Burns v. United States*, 501 U.S. 129 (1991) (failure to so interpret Rule 32 would raise a "serious question whether notice in this setting is required by the Due Process Clause").

[18] *Olyer v. Boles*, 368 U.S. 448 (1962) does not suggest otherwise. In *Olyer*, a state statute permitted a recidivist information to be filed after conviction on a substantive offense and that filing could increase the statutory maximum. However, the defendant was required to separately plead to that information and the statute required the state to prove the prior convictions beyond a reasonable doubt. In absence of these special procedures that made the recidivist filing the virtual equivalent of a separate offense, the statutory scheme would have offended the due process notice issue raised herein. Thus, Petitioners do not argue that a legislature cannot choose to devise a mechanism other than the indictment for providing

defendant cannot knowingly plead guilty without knowing the statutory maximum he faces, he cannot chose to proceed to trial without that information.

Within Title 21 itself, Congress has shown that it is well aware of this timely notice obligation. In creating new enhancement penalties for prior narcotics offenses in 21 U.S.C. § 851, Congress required the government to file an information setting forth the prior convictions it contends would enhance the statutory maximum sentence. Failure to file this notice before trial bars an enhancement of the maximum sentence as a recidivist. Interpreting Section 851, the lower courts have recognized that Congress enacted Section 851 to fulfill the Due Process requirement that "a defendant receive reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism." *United States v. Belanger*, 970 F.2d 416, 418 (7th Cir. 1992); *United States v. Garrett*, 565 F.2d 1065, 1072 (9th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978) ("[F]ailure to comply with Section 851(b) renders the sentence illegal.").[19] However, for Section 846

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timely notice of an enhanced statutory maximum. Rather, we argue only that Congress did not do so for Section 846 conspiracies. Therefore, the indictment must serve as the means for providing such notice. A bill of particulars will not suffice because under Federal Rule of Criminal Procedure 7(f), the court has discretion to deny a defense request for a bill.

[19] As argued elsewhere, Petitioners contend that the explicit reference in Section 846 to the differing penalties provisions of Title 21 also shows that Congress intended the government to give the defendant notice of the statutory maximum in the indictment by requiring the specific object of the conspiracy to be named, whether it be the specific controlled substance in Section 841(b) or a separate provision of Title 21. Nor can the government argue any inferences from the absence of notice provisions similar to Section 851 in Section 846. The long-standing practice of the government has been to specify the controlled substance at issue in the indictment, *see* n.8 *infra*

conspiracies, Congress assumed that the government would continue to provide timely notice to defendants by including in the indictment sufficient information to determine the maximum sentence faced by a defendant. *See United States v. Gibbs*, 813 F.2d 596 (3d Cir. 1987) (in conspiracy count, listed overt acts in indictment served notice of maximum penalties; specification of threshold quantity of marijuana not required.), *cert. denied*, 484 U.S. 822 (1987); *United States v. Williams*, 107 F.3d 869 (4th Cir. 1997). Indeed, without identification of the drugs and quantity thresholds, the purpose of the notification requirement is defeated and the notice is ineffective, because the defendant will not know the specific penalty range that is being enhanced. *Compare* Section 841(b)(1)(A) *with* 841(b)(1)(B).

Thus, the Seventh Circuit's holding that such threshold information is not required would create a host of the Due Process notice problems that the foregoing cases prohibit. Without question, Congress acted within its power to create a statutory scheme that includes different statutory maximums for different types and quantities of narcotics in Section 841. An indictment for "conspiracy to distribute controlled substances" that the Seventh Circuit would permit, however, simply fails to provide timely and meaningful notice to the defendant of the true maximum penalty he faces.[20] An indictment only provides

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at 16. Congress is presumed to have been aware of this practice, obviating the need for a special provision here. Lastly, the meaning the government might attribute to Congressional silence runs counter to many other cases in which a deprivation of notice has been held to raise due process concerns. *See Burns*, 501 U.S. at 137-38.

[20] Taken to its logical end, the Seventh Circuit's opinion would permit a legislature to write an entire criminal code as one statutory section. All existing crimes could be included as subsections with separate penalty clauses. Thus, an indictment under this code could read, "violation of the criminal code, § 1."

satisfactory due process protection to the defendant if it fairly informs him of the crime with which he is charged and enables him to plead acquittal or conviction in bar of future prosecutions for the same offense. *Schooner Hoppet & Cargo v. United States*, 11 U.S. 389 (1813) (an indictment must contain "a substantial statement of the offence upon which prosecution is founded" and "cannot be satisfied by a general reference to the provisions of a statute"); *United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir. 1978), *cert. denied*, 439 U.S. 964 (1978). To be informed of the crime charged necessarily includes notice of both the conduct forbidden and the penalty prescribed. *See* 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* 1.2 (1986); *see also United States v. Evans*, 333 U.S. at 485-95; *United States v. Eaton*, 144 U.S. 677, 686 (1892). Thus, in its effort to assist the government in avoiding the sentencing conundrum created by its own charging decisions, the lower court has sanctioned a form of indictment that deprives the defendant of his Due Process rights.

Nor can the government overcome the Due Process implications of its position by contending that the defendant is always on notice that the maximum penalty under a Section 846 conspiracy is life because that is the maximum penalty under some subsections of the penalty provisions of Section 841. A defendant can have a legitimate need to know the true statutory maximum he faces before trial. For example, if a defendant is charged with two separate counts of conspiracy, one carrying a possible life sentence and another carrying less than life, his trial strategy might well be to attack the evidence on the life count more strenuously. In this case, if the government had chosen to charge the powder and crack conspiracies separately, the defendant might have been better able to expose the weaknesses of the crack conspiracy which

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A defendant would not know if he faced the maximum subsection penalty for jaywalking or for murder until sentencing.

carried the more severe penalty. In other words, if the government is permitted to co-mingle sub-provisions of Section 841 that carry different statutory maximums in a single count of Section 846, yet the court can sentence on the greater offense, the government can more easily obtain the more severe penalty than if the conspiracies were charged separately. Furthermore, because the Seventh Circuit holds that the defendant is not necessarily entitled to special verdicts on dual object conspiracies, there is no way to prevent the government from using this tactic to its advantage. Thus, condoning the Seventh Circuit's interpretation of how Section 846 may be charged and sentenced actually encourages the government to charge drug conspiracies in a manner that increases the risk of a variance between the jury's verdict and the correct statutory punishment. The Seventh Circuit opinion violates both the spirit and the letter of this Court's Due Process decisions. *See Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (Due Process should not require one to "speculate as to the meaning of penal statutes").[21]

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[21] The government cannot argue that the due process notice issue is moot in this case because these defendants were put on notice that the maximum penalty in this case was life because Count One included crack cocaine as an object of the conspiracy for two reasons. First, this argument undercuts the foundation of the Seventh Circuit's reasoning – that the wording of the indictment is irrelevant because all Section 846 and Section 841 indictments charge a single crime of conspiracy to distribute controlled substances. Second, these defendants were still faced with the strategic dilemmas identified above – they did not know before trial began, exactly how the jury would vote on the statutory maximums they faced. For example, a mid-trial ruling that there would be special jury interrogatories on the conspiracy count would dramatically have changed the nature of the trial.

C. The Case Must Be Remanded For Resentencing

As Petitioners' sentences were imposed in violation of law and as a result of an incorrect application of the Guidelines, this case should be remanded to the District Court for resentencing. 18 U.S.C. § 3742(f)(1) provides that "if the court of appeals determines that the sentence was imposed in violation of law or as a result of an incorrect application of the Sentencing Guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." In *Williams v. United States*, 503 U.S. 193 (1992), this Court interpreted Section 3742(f) as obliging reviewing courts to determine whether "the sentence [was] imposed either in violation of law or as a result of an incorrect application of Guidelines[.] If so, a remand is required under § 3742(f)(1)." *Id.* at 202.

As the sentences imposed upon Petitioners either violated Petitioners' Fifth and Sixth Amendment rights or were in excess of the statutory maximum for an unspecified powder cocaine conspiracy, these sentences were imposed in violation of law. Section 3742(f)(1), as interpreted in *Williams*, requires no further analysis at this point; it requires only that the case be remanded for further sentencing proceedings.[22]

This Court held in *Williams* that not all errors under the Sentencing Guidelines will result in a remand; if the party defending the sentence can persuade the appellate court that the error was harmless, that is, "that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required." *Id.*

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[22] In *Williams*, the petitioner challenged a departure from the Guidelines. The Court of Appeals found two of the grounds stated for the departure valid and the other invalid, and affirmed the sentence. This Court vacated and remanded to the District Court for a determination of whether the sentence was imposed as a result of the invalid ground for departure. *Williams*, 503 U.S. at 206.

at 203. In this case, the error made by the district court judge was clearly not harmless. In developing and drafting the Sentencing Guidelines, the United States Sentencing Commission (hereinafter "Commission") recognized two differing approaches to sentencing – "real offense" sentencing, which bases sentences on the actual conduct undertaken by a defendant, regardless of the charges for which the defendant was indicted or convicted, or "charge offense" sentencing, which bases sentences upon the conduct that constitutes the elements of the offense for which the defendant was charged and convicted. Federal Sentencing Guidelines Manual ("Guidelines") § 1.A.4(a). The Guidelines embody a modified charge offense system, in which the offense of conviction plays an essential role in sentencing and is consistently distinguished from other, "real offense" elements.

The Guidelines provide a multiple-step sentencing process. The Guidelines direct the sentencing judge first to "[d]etermine the *offense* guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)" and, following the determination of what offense guideline section is applicable, then to consider other relevant conduct in determining the appropriate sentence. *Id.* § 1B1.2. Hence, the Guidelines draw a clear distinction between "offense of conviction" and "relevant conduct." This distinction is carried throughout the Guidelines. *See, e.g., id.* § 3B, Introductory Commentary; § 3E1.1, n. 1(a); § 3D1.1; § 4B1.1; § 5B1.1(b); 5D1.2(a). Each of these determinations is governed by the sentencing judge's determination of the offense of conviction.

Given that the sentencing levels for cocaine base are far greater than for the same amount of powder cocaine, and the different relevance that evidence of base cocaine would have in sentencing for a powder-only conspiracy as opposed to a conspiracy that includes cocaine base, this case must be remanded for resentencing or a new

trial. Law enforcement officers seized only small amounts of controlled substances in this case. Thus, the District Court, in making its determination of the amount and kind of controlled substance for which each Petitioner would be held responsible, considered primarily the testimony of various witnesses, and ascribed to Petitioners amounts that they could reasonably foresee as being in furtherance of the conspiracy. These witnesses described the movement of larger quantities of powder cocaine, and ascribed certain percentages of the cocaine to powder and certain percentages to base. The court then modified both the amount of the cocaine and the proportion of base to powder based on the credibility of the various witnesses. For example, the court sentenced Petitioner Fort on the conspiracy count based on his responsibility for 24 kilograms of cocaine, of which the court found half to be base. That amount and proportion, however, differed from the amount and proportion given by witnesses, who testified to greater amounts of cocaine, and that the proportion of base to powder was three to one. The judge, however, found that the witnesses so testifying were not entirely credible, and thus discounted their testimony by a certain percentage. Had the jury unambiguously found a powder cocaine conspiracy, the court may have found, for example, that any amount of crack cocaine would not be reasonably foreseeable by one who had entered into a powder conspiracy. Thus, in Fort's case, had the judge found the same amount of cocaine to be involved, but did not ascribe any of it to cocaine base, Fort's sentence would have been substantially less than the mandatory life sentence he received.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court remand this case for resentencing or a new trial.

Dated: December 1997

Respectfully Submitted

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Appendix

Relevant Statutory and Constitutional Provisions

The Fifth Amendment of the Constitution of the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 U.S.C. § 846, "Attempt and conspiracy" provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter

shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18 U.S.C. § 841, "Prohibited acts" provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and

derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable

amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person

shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or

substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any

person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than

an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in > section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with > Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate

unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub.L. 98-473, Title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub.L. 99-570, Title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with > Title 18, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging

in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under > Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under > Title 18, or imprisoned not more than one year, or both.
